BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates	Docket No. G02-45 PREMERA'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

Premera's Motion for Partial Reconsideration and Clarification ("Motion") raises two issues: first, whether the "statement" discussed in RCW 48.31B.015(4)(b) and RCW 48.31C.030(4) is Premera's Form A statement or, rather, the entire agency record; and second, whether any adjudicative hearing must take place within the 60-day review period that is discussed in the same statutes. These are pure questions of law, and the governing statutes (RCW chapter 48.31B, the "Holding Company Act," and RCW chapter 49.31C, the "Health Carrier Act") and regulations answer both of them.

The "statement" that RCW 48.31B.015(4)(b) and RCW 48.31C.030(4) refer to is the statement required under RCW 48.31B.015(1) and RCW 48.31C.030(1). The same statutes and their implementing regulations prescribe the content of that statement. Nowhere is there any suggestion that the Form A statement includes the agency record. Similarly, the language and history of the Holding Company Act and the Health Carrier Act make clear that all administrative proceedings, including discovery and any

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adjudicative hearing, must be conducted within the 60-day period prescribed for review of the Form A statement.

The response by the OIC Staff ("Staff Response") ignores the first issue—namely, what is a "statement"—and challenges Premera only on the timing of the hearing. The Staff Response then suggests that the answers do not matter, since the Commissioner can ignore the 60-day review requirement with impunity. The Staff Response also focuses upon issues that the Motion did not raise.[1] The would-be intervenors do the same.[2] Their arguments should be rejected, and Premera's request for revision of the Commissioner's First Order should be granted.

II. ARGUMENT

A. The Sixty-day Review Period Runs from the Time the Form A Statement Is Complete.

The Commissioner's review of Premera's Form A statement is governed by the Holding Company Act and the Health Carrier Act (collectively, the "Acts"). The Acts set out a specific timeline for review and approval of the Form A statement. Under the Acts and the implementing regulations, the 60-day review and approval period begins on the date the Form A statement is "complete."

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[1] For example, the Motion did not ask the Commissioner to decide whether the materials filed by Premera as of October 25, 2002, constituted a complete Form A statement. Such a decision may require detailed review of those materials and remains for another day. Nor did the Motion suggest that Premera can declare its own Form A statement to be complete. For that matter, the Commissioner's First Order did not declare whether the materials filed as of October 25, 2002, constituted a complete "statement." Rather, the First Order offered a statutory interpretation of the Holding Company Act.

[2] The would-be intervenors filed a joint response to the Motion without invitation and without being parties to the case. Although their brief is not properly before the Commissioner, Premera has endeavored to reply to those arguments that address the legal issues raised by its Motion.

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RCW 48.31C.030(4); RCW 48.31B.015(4)(b); WAC 284-18A-350; WAC 284-18-300. Neither the Acts nor the implementing regulations give the Commissioner discretion to change the trigger date for the 60-day review period. The Acts require the Commissioner to approve the transaction 60 days after the Form A statement is complete. RCW 48.312C.030(4); RCW 48.31B.015(4)(b).

B. The Completeness of the Form A Statement Is Measured by the Language of the Acts.

The completeness of the Form A statement is determined by reference to specific statutory requirements. The information to be included in a "statement" is prescribed in RCW 48.31C.030(2)(*a*)-(*k*) and RCW 48.31B.015(2)(*a*)-(*k*). The regulations implementing the Acts require an applicant to provide this statutorily required information in the Form A statement. *See* WAC 284-18A-350; WAC 284-18-300.

The Form A statement does not include the agency record or other material not identified in the statute. Premera's Form A statement is distinct from the submissions of other entities, such as OIC Staff and consultants, which will form part of the agency record. Logically, Premera's Form A statement cannot be considered incomplete just because outside consultants have not yet prepared their reports evaluating that statement and the proposed conversion. Likewise, while review of a Form A statement may require an adjudicative hearing, a Form A statement does not *itself* include a hearing. Therefore, a Form A statement cannot be considered incomplete just because a hearing remains to be held.

For the same reasons, the Commissioner should reject the Staff's puzzling argument that Premera's statement will not be complete until Premera responds to future requests raised at the hearing that are not from the Commissioner and not related to the

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Form A statement. Staff Response at 5:14-19. That interpretation is contrary to the statutory language, which focuses exclusively on the Form A statement and requires that any incompleteness finding be specific, prompt, and from the Commissioner. RCW 48.31C.030(4).

The would-be intervenors point to language in the Acts stating that the Commissioner may require "such additional information as the commissioner may prescribe by rule as necessary or appropriate for the protection of subscribers of the health carrier or in the public interest." RCW 48.31C.030(2)(*l*); RCW 48.31B.015(2)(*l*) (emphasis added). They suggest (at 8-9) that any request for more information by the Commissioner is a "rule" that expands the necessary contents of a Form A statement. The Commissioner, however, may not engage in rulemaking via an order. *See* RCW 48.31B.040; RCW 48.31C.150; RCW 34.05.310 - .395 (rule-making procedures). The language in the Order stating that "[Premera's] Application will not be considered complete until the adjudicative hearing has concluded and the administrative record is closed," Order at 2 ¶ 1, should be modified to conform with the statutory provisions.

C. The Sixty-day Review Period Encompasses Any Administrative Hearing That the Commissioner May Hold.

Premera and the OIC Staff disagree as to the proper interpretation of RCW 48.31C.030(4) and RCW 48.31B.015(4)(b). There is no dispute that the phrase "within sixty days" modifies the clause that immediately succeeds it, "after [the Commissioner] declares the statement . . . complete," but the Staff argues that it also modifies the distant phrase "after holding a public hearing."[3] Thus, Premera argues that the public hearing must occur within the 60-day review period, while the Staff argues that the 60-day review

[3] *See* Staff Response at 3-4.

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period does not begin until after both the Form A statement and the hearing are complete. The Staff's argument is contrary to the language and history of the Holding Company and Health Carrier Acts.

1. The Staff's Arguments Are Contrary to the Language of the Statute and Well-Established Canons of Construction.

The Staff's interpretation of RCW 48.31C.030(4) and RCW 48.31B.015(4)(b) is contradicted by a basic rule of statutory construction. Courts have long held that a modifier, such as the prepositional phrase "within sixty days," relates only to the words that immediately precede or follow it, unless a contrary intention is clear from the statute. *See, e.g.*, *State v. Wentz*, 110 Wn. App. 70, 73-74, 38 P.3d 393 (2001); *In re Payless Cashways*, 215 B.R. 409, 414-15 (W.D. Mo. 1997) (explaining that a modifier should be "tied" to the words that "appear[] just before or after the phrase."). Here, there is no statutory signal that the phrase "within sixty days" is meant to modify the phrase "after holding a public hearing."[4] Consequently, the phrase "within sixty days" modifies only the words that immediately follow it.[5]

[4] To the contrary, the most logical reading of the statute indicates that the gerund phrase "after holding a public hearing" ties back to the main clause in the first sentence of RCW 48.31B.015(4)(b): "The commissioner shall approve an exchange or other acquisition of control referred to in this section . . . after holding a public hearing." The would-be intervenors argue (at 6) that Premera's interpretation would render the phrase "after holding a public hearing" superfluous. They are mistaken. The language has two functions. First, as the Staff Response (at 3) recognizes, that language makes the public hearing mandatory under the Holding Company Act. Second, it establishes that once the Commissioner declares a Form A statement complete, he may not approve a change in control before holding a public hearing, if one is required.

[5] The would-be intervenors argue (at 5) that the Commissioner must make a decision within 60 days after he determines the statement to be complete or 60 days after a hearing, "whichever is later." The statute affords no basis for this argument. Had such a result been intended, the Legislature certainly knew how to express it.

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2. Legislative Intent Confirms Premera's Reading of the Acts.

Premera's interpretation is confirmed by the legislative history of the Acts. In passing SHB 1855, portions of which became the Holding Company Act, the Legislature announced that its intent was to amend the Washington Insurance Code to "conform to the NAIC's recommended financial regulations standards and recommended regulatory statutes." *See* Final Bill Report, Synopsis as Enacted, SHB 1855, at 1 (July 25, 1993); *see also* House Bill Report, SHB 1855, at 2 ("The bill was developed over a two year period working very closely with the National Association of Insurance Commissioners . . . "). Similarly, the legislative history for the Health Carrier Act demonstrates the Legislature's intent to extend key provisions of the Holding Company Act to health care service contractors and HMOs. *See* House Bill Report, HB 1792 at 2; *id.* at 3 (recounting testimony from Commissioner Kreidler that the bill "is similar to the existing holding company act").

Both the Holding Company and Health Carrier Act derive from the NAIC's Insurance Holding Company System Regulatory Act ("Model Act").[6] The Model Act places a premium on efficient and prompt review of a change in control.[7] It, like the Holding Company and Health Carrier Acts, creates a 60-day review period in which the

[6] *See generally* 3 NATIONAL ASS'N OF INS. COMM'RS, MODEL LAWS REGULATIONS AND GUIDELINES 440-31 to 440-32 (2002) [hereinafter "NAIC, Model Laws"] (explaining that RCW chapter 48.31B and Substitute House Bill 1792, which became RCW chapter 48.31C, derive from the Model Act).

[7] *See* Motion at 11 (discussing the policy and Constitutional reasons for rapid review of a Form A statement filed during a change in control). Indeed, the NAIC has explained that the Holding Company Act, by setting a short deadline for review and by making approval of a change in control mandatory absent specific findings, selects "disclosure" as the primary regulatory tool rather than "prior approval." 1969-1 NAIC Proc. 171, 186; *see also* NAIC, Model Laws at 440-38 (noting that the Model Act "place[s] a strong emphasis on disclosure" rather than "prohibitory features").

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Commissioner must act. *See* Model Act § 3(D)(2); RCW 48.31B.015(4)(b); 48.31C.030(4). The Washington Acts and Model Act diverge slightly, however, because the Model Act specifically states that the public hearing must occur within 30 days after the filing of the Form A statement, Model Act § 3(D)(2), whereas the Washington Acts give the Commissioner more scheduling flexibility within the 60-day review period. RCW 48.31B.015(4)(b); 48.31C.030(4).

The Staff distorts this flexibility and attempts to use it to turn the Model Act on its head. The Staff suggests that the Legislature intended to change the Model Act in a manner that allows the 60-day review period to be postponed indefinitely.[8] Staff Response at 3-4.[9] That interpretation is utterly inconsistent with the Legislature's stated intent to faithfully enact the NAIC regulatory statutes. Had the legislature intended to effect such a radical change of the Model Act, it would have said so. *See, e.g.*, *Chisom v.*

[8] The would-be intervenors essentially concede that their reading of the statue would—contrary to the statutory language and legislative history—allow indefinite delay of the review period. They imply (at 6 n.3) that the First Case Management Order solves this problem, but they neglect to mention that the Order sets no deadline for conclusion of discovery, for the hearing, or for the Commissioner's ruling. They also suggest (at 12) that the Commissioner should not set a deadline for the hearing or for his ultimate ruling because any such deadline would "encourage Premera to withhold access" to necessary information. To the contrary, a firm deadline of the sort set out in the Acts has the same function as a court's scheduling order: it forces the parties to work promptly and diligently. If a dispute arises as to the adequacy of information provided and the ability of a party to proceed to hearing, the Commissioner can resolve it at that time.

[9] The Staff offers two other arguments in support of its position. First, the Staff argues that a party might otherwise request a hearing on the 59th day and mess up the schedule. Staff response at 5. This ignores the fact that a hearing is required under the Holding Company Act. Equally, the Commissioner may establish a deadline for requesting a hearing whenever the hearing is not otherwise required. Second, the Staff argues that mandatory statutory language such as "shall" may be read as permissive where legislative intent indicates that the ordinary meaning of the word should not be used. Staff Response at 5-6. Here, however, the legislative history of the Acts belies the Staff's contention: there is no intent to grant the Commissioner discretion to disregard the 60-day review period.

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Roemer, 501 U.S. 380, 396 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point . . . .").

Legislative history also resolves the argument that the 60-day review period cannot begin when the Form A statement is complete, because the Legislature must not have intended to provide such a short period for discovery and the hearing process. Staff Response at 7:6-10, 9-10; would-be intervenors' response at 11. The Model Act sets the hearing no later than 30 days after the Form A statement is complete and it, like the Holding Company and Health Carrier Acts, requires that all discovery be complete not later than three days before commencement of the hearing. Model Act § 3(D)(2); RCW 48.31B.015(4)(b); RCW 48.31C.030(4). Thus, the Model Act provides parties no more than 27 days of discovery.[10] The Washington Acts similarly reflect the Model Act's decision to limit the time for discovery, presumably to ensure that the parties focus solely upon the specific issues set forth in the Acts rather than engaging in open-ended and wide ranging fishing expeditions.[11]

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[10] The Model Act wholly undermines the would-be intervenors' argument (at 11) that "there would not be enough time . . . [to] engage in adequate discovery . . . and prepare and participate in an administrative hearing before the 60-day time-limit ran."

[11] Premera is not required to demonstrate prejudice in order for the statute's provisions to be followed. Upon the completion of its Form A statement, Premera has a right to the review period contemplated by the statute. *See State v. T. K.*, 139 Wn.2d 320, 334, 987 P.2d 63 (1999) (substantive rights may arise once an entity has completed its obligations under a mandatory statute: "Pursuant to the statutory language, completion of these [statutory] requirements mandated [the requested action] . . . the right to [the requested action] became absolute upon completion of the statutory conditions."). The Commissioner may not alter this right by Order. *See, e.g., Mission Springs v. Spokane*, 134 Wn.2d 947, 961, 954 P.2d 250 (1988) (city may not deprive applicant of rights by delaying issuance of building permit in order to undertake further study).

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D. The Administrative Procedure Act Does Not Enlarge the Sixty-Day Review Period.

The Staff suggests that the discovery provisions in the Administrative Procedure Act ("APA") expand the specific 60-day review period provided in the Acts. Staff Response at 6-7. On the contrary, the APA's provision allowing for discovery to be conducted according to the Civil Rules does not enlarge the Acts' specific statutory timeline for Form A statement review and approval. While the Commissioner may permit discovery under the APA, there is nothing in this discretion that displaces the 60-day requirement in the Acts. Washington law is clear that the Commissioner cannot exercise his discretion in a manner inconsistent with the Acts. *See* RCW 34.05.570(3)(c)-(d); *cf*. *In re George*, 90 Wn.2d 90, 97, 579 P.2d 354 (1978) ("We are committed to the principle that an administrative agency may not, by interpretation, amend or alter the statutes under which it functions.").[12]

The APA allows the Commissioner discretion to "decide whether to permit" discovery pursuant to the specific "procedures authorized by rules 26 through 36 of the superior court civil rules." RCW 34.05.446(3). Under the APA, the Commissioner may deny discovery altogether unless the party who seeks it makes "a showing of necessity and unavailability by other means." *Id.* In ruling on discovery, the Commissioner is required to consider, among other factors, "whether undue expense or delay in bringing the case to hearing will result" from the discovery and "whether the discovery will promote the orderly and prompt conduct of the proceeding." *Id.*

[12] Even the would-be intervenors recognize (at 6 n.3) that "[c]learly, the Commissioner may not delay the review of Premera's application indefinitely."

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The possibility of intervention does not change this analysis.[13] As with other requests for discovery, the APA allows the Commissioner to limit "the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings." RCW 34.05.443(2)(b).[14] The fact that the Acts and the APA both contemplate discovery does not support the suggestion that the timing of traditional discovery methods expands the Form A statement review period. To the contrary, the Commissioner is specifically empowered to limit discovery in order to meet the statutory timeline for this proceeding.

III. CONCLUSION

Premera welcomes the OIC's review of its Form A statement and is cooperating with the OIC Staff and consultants to facilitate that review.[15] Premera respectfully requests that the Commissioner clarify and amend its First Order to reflect what the Acts require—namely, that the Commissioner will conduct his review of the Premera Form A

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[13] Much of the brief of the would-be intervenors is devoted to a gratuitous reiteration of their alleged interest in the proceeding. This recitation is wholly outside the scope of the Motion, which raises only statutory interpretation issues. Insofar as the brief of the would-be intervenors reiterates their arguments on the Motions to Intervene, Premera will respond on December 11 as provided in the First Order.

[14] That the Commissioner is empowered to limit intervenor participation eviscerates the would-be intervenors' argument (at 11-12) that they have a statutory right that would be denied if the Commissioner follows the Acts' timeline for Form A statement review and approval. Intervenors have no greater rights than the original parties; they, too, must abide by the schedule established for the hearing and decision.

[15] As the Commissioner notes, Premera has previously agreed to extend the 60-day period until December 27, 2002, to give the Commissioner additional time to review the Premera Form A statement. Order at 2 ¶ 1. The Commissioner requested that extension in recognition of the otherwise binding nature of the 60-day requirement. As detailed in correspondence with the OIC Staff and as reflected in Premera's Status Report to the Commissioner, Premera is amenable to discussing a further extension of the 60-day

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statement, including any hearings and related proceedings, and approve or disapprove the Application within 60 days after the Form A statement is complete or by such subsequent deadline as may be stipulated by the parties and confirmed by Order.

DATED this 27th day of November, 2002.

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period to March 1, 2003. The would-be intervenors' repeated assertion (at 2, 13) that Premera seeks to "rush" a decision flies in the fact of the facts.

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DATED this ____ day of November, 2002.

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